

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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DERRICK LAMAR MCKNIGHT,

Case No. 3:17-cv-00681-MMD-CLB

Petitioner,

ORDER

v.

WARDEN BAKER, *et al.*,

Respondents.

**I. SUMMARY**

In his amended 28 U.S.C. § 2254 habeas corpus petition Derrick Lamar McKnight challenges his Clark County, Nevada conviction by a jury of charges including robbery and first-degree murder with use of a deadly weapon. (ECF No. 48.) He is serving a term of life without the possibility of parole. (ECF No. 56-18 (Exhibit (“Exh.”) 68).) Respondents have filed a Renewed Motion to Dismiss (“Motion”), arguing that the original and amended petition are untimely, that no claims relate back to a timely petition, and that some claims are either procedurally defaulted or unexhausted. (ECF No. 74.)<sup>1</sup> The Court concludes that the original petition is timely and that some claims from the amended petition relate back and are therefore timely. Several claims of ineffective assistance of trial or appellate counsel are unexhausted. McKnight also asks for a stay of this case so that he may return to state court to present his unexhausted ineffective assistance claims. Because McKnight was never granted counsel throughout his state postconviction proceedings, the Court grants a stay and abeyance.

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<sup>1</sup>McKnight opposed, and Respondents replied. (ECF Nos. 75, 77.)

## II. BACKGROUND

### A. State-Court Proceedings

McKnight's convictions arose from an incident in which he and Timothy Burnside followed Kenneth Hardwick when he drove out of the Mandalay Bay casino in Las Vegas and robbed and shot Hardwick in a Jack in the Box drive-through, killing him. (See ECF No. 55-48 (Exh. 48 at 13-29).) McKnight and Burnside were tried together. The jury found McKnight guilty of burglary (count 1), conspiracy to commit robbery (count 2), robbery with use of a deadly weapon (count 3), and first-degree murder with use of deadly weapon (count 4). (ECF No. 56-7 (Exh. 57).) At the penalty phase, the jury sentenced McKnight to life without the possibility of parole for the murder count.<sup>2</sup> (ECF No. 56-12 (Exh. 62).) Judgment of conviction was entered on August 18, 2010. (ECF No. 56-18 (Exh. 68).)

The Nevada Supreme Court denied McKnight's direct appeal in December 2015. (ECF No. 56-48 (Exh. 98).) The state district court declined to appoint counsel for McKnight's state postconviction petition. The Nevada Supreme Court affirmed the denial of his state postconviction petition in June 2017. (ECF No. 57-17 (Exh. No. 117).) McKnight initiated a *pro se* federal habeas action in November 2017. (ECF No. 1-1.) Next, in August 2018 he filed a second state postconviction petition. (ECF No. 57-12 (Exh. 122).) The state district court dismissed the petition as untimely, successive, and an abuse of the writ, finding that McKnight failed to demonstrate good cause and actual prejudice or a fundamental miscarriage of justice. (ECF No. 57-13 (Exh. 123).) The Nevada Supreme Court affirmed the denial in June 2019. (ECF No. 57-32 (Exh. 132).) The court concluded that the district court did not err in rejecting McKnight's good cause

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<sup>2</sup>The State originally sought the death penalty against both defendants but withdrew its intent as to McKnight before trial. The jury sentenced Burnside to death. (See ECF No. 56-13 (Exh. 63).) The state district court sentenced McKnight as follows: count 1 – 22 to 96 months, count 2 – 13 to 60 months, count 3 – 35 to 156 months, with an equal and consecutive 35 to 156 months for the deadly weapon enhancement, count 4 – life without the possibility of parole, with an equal and consecutive life without the possibility of parole for the deadly weapon enhancement, count 1, 2, 3 to run concurrently and count 4 to run consecutive to counts 1, 2, 3. (ECF No. 56-15 (Exh. 65).)

1 argument and that he failed to demonstrate actual innocence as a gateway through the  
2 procedural bars.

### 3 **B. Federal Habeas Proceedings**

4 As noted above, in November 2017, McKnight dispatched his *pro se* federal  
5 habeas petition for mailing. (ECF No. 1-1.) The Court ultimately appointed counsel under  
6 the Criminal Justice Act, and McKnight filed a counseled amended petition. (ECF No. 48.)  
7 He alleges 10 grounds for relief:

8 Ground 1: Trial counsel rendered ineffective assistance in violation  
9 of his Sixth and Fourteenth Amendment rights by:

10 (a) Failing to identify the constitutional basis for his motion to  
11 suppress the improper and suggestive eyewitness identification  
by Syncerrity Ray.

12 (b) Failing to consult with an eyewitness identification expert and  
13 have the expert testify at the suppression hearing and trial.

14 (c) Failing to investigate and present a defense theory that this was  
15 an afterthought robbery.

16 (d) Failing to investigate other eyewitnesses and call them to testify  
at trial.

17 (e) Failing to allow McKnight to testify in his own defense.

18 (f) Failing to object to the prosecution's statement during closing  
19 argument that the jury did not need to understand or determine  
20 the reason Hardwick was targeted.

21 (g) Failing to object to prosecution becoming an unsworn witness  
22 when prosecutor argued that the JIB video showed that McKnight  
23 was the lookout for Burnside when there was no video footage of  
McKnight.

24 (h) Failing to object, move to strike, and move for mistrial during the  
25 penalty phase when Burnside's attorney introduced testimony  
26 from a witness who purportedly overheard McKnight and  
Burnside arguing, with McKnight stating: "I don't fight people, I kill  
people."

27 (i) Failing to investigate and introduce mitigation evidence and move  
28 to counter or eliminate aggravating evidence such as the

1 preliminary hearing transcripts from an unrelated murder case  
2 that was subsequently dismissed.

3 (j) Cumulative effect of trial counsel's ineffective assistance.

4 Ground 2: Appellate counsel was ineffective for failing to argue that  
5 the denial of the motion to suppress the improper and suggestive  
6 eyewitness identification of Syncerrity Ray violated McKnight's Fifth  
7 and Fourteenth Amendment due process rights.

8 Ground 3: The trial court allowed the prosecution to improperly  
9 dismiss three potential jurors of color during voir dire and also  
10 allowed the executive director of a white supremacist group to serve  
11 on the jury, in violation of McKnight's Fifth and Fourteenth  
12 Amendment equal protection rights.

13 Ground 4: The trial court failed to hold a hearing or make an inquiry  
14 into allegations that a juror was sleeping for lengthy periods during  
15 the trial in violation of McKnight's due process rights.

16 Ground 5: The trial court failed to sever McKnight's trial from  
17 Burnside's death penalty trial, and Burnside's counsel introduced  
18 harmful and prejudicial evidence against McKnight in violation of his  
19 Sixth Amendment right to an impartial jury.

20 Ground 6: The trial court allowed four jury instructions that confused  
21 the jury about the standard to prove guilty beyond a reasonable  
22 doubt in violation of McKnight's Fifth and Fourteenth Amendment fair  
23 trial rights.

24 Ground 7: The trial court allowed the prosecution to introduce at trial  
25 the preliminary transcript from an unrelated murder case against  
26 McKnight which was later dismissed.

27 Ground 8: The State engaged in prosecutorial misconduct in  
28 violation of McKnight's fair trial rights when it used information from  
a pending and unrelated murder as aggravating evidence during the  
penalty phase and then later dismissed the unrelated case due to  
identification issues.

Ground 9: The cumulative effect of the errors of the trial court and  
trial and appellate counsel, and prosecutorial misconduct deprived  
McKnight of a fair trial.

Ground 10: McKnight is actually innocent, thus his continued  
incarceration violates the Eighth Amendment's prohibition of cruel  
and unusual punishment and his due process rights.

1 (ECF No. 48 at 4-9.)

2 Respondents now move to dismiss the petition, arguing that it is untimely, several  
3 grounds do not relate back to a timely petition and/or are unexhausted, and one ground  
4 is procedurally defaulted. (ECF No. 74.)

### 5 **III. DISCUSSION**

#### 6 **A. McKnight's Federal Petition is Timely**

7 The Antiterrorism and Effective Death Penalty Act ("AEDPA") imposes a one-year  
8 statute of limitations on the filing of federal habeas corpus petitions. See 28 U.S.C. §  
9 2244(d). The one-year time limitation can run from the date on which a petitioner's  
10 judgment became final by conclusion of direct review, or the expiration of the time for  
11 seeking direct review. See 28 U.S.C. § 2244(d)(1)(A). Where a defendant fails to seek a  
12 writ of certiorari from the United States Supreme Court, AEDPA's one-year limitations  
13 period begins to run on the date the 90-day period expires. Supreme Court Rule 13.

14 Here, McKnight timely appealed, and the Nevada Supreme Court affirmed his  
15 convictions on December 18, 2015. (ECF No. 56-48 (Exh. 98).) He did not file a petition  
16 for a writ of certiorari, so the AEDPA limitations period began to run on March 18, 2016.  
17 See *Patterson v. Stewart*, 251 F.3d 1243, 1247 (9th Cir. 2001).

18 McKnight timely filed a state postconviction habeas corpus petition on September  
19 2, 2016. (Exh. 102.) The state district court denied the petition because it failed to raise a  
20 single claim and was "devoid of any content or any argument in support of relief." (ECF  
21 No. 57-5 at 3 (Exh. 105).) At the close of his petition, McKnight had asked for counsel  
22 because he was indigent, did not understand the law, and required appointed counsel to  
23 help him file a supplemental petition. The court found that because McKnight failed to  
24 raise a single issue, he failed to present any issue of particular difficulty that would warrant  
25 appointment of counsel. (*Id.*)

26 McKnight argued on appeal that the district court abused its discretion in denying  
27 his petition without appointing counsel. (ECF No. 57-10 (Exh. 110).) The Nevada  
28 Supreme Court acknowledged his lengthy sentences, but affirmed the district court,

1 holding that McKnight failed to identify any issues in his state petition, and therefore failed  
 2 to show that his case presented difficult issues or that he needed counsel to conduct  
 3 discovery. (ECF No. 57-17 at 3 (Exh. 117).) The appellate court also concluded that  
 4 McKnight's bare assertion of ignorance of the law did not demonstrate an inability to  
 5 comprehend the proceedings compelling appointment of counsel. (*Id.*)

6 A properly filed petition for state postconviction relief can toll the period of  
 7 limitations. See 28 U.S.C. § 2244(d)(2). A state petition is "properly filed" "when its  
 8 delivery and acceptance are in compliance with the applicable laws and rules governing  
 9 filings." *Artuz v. Bennett*, 531 U.S. 4, 8 (2000). The governing laws and rules "usually  
 10 prescribe, for example, the form of the document, the time limits upon its delivery, the  
 11 court and office in which it must be lodged, and the requisite filing fee." *Id.*<sup>3</sup> The United  
 12 States Supreme Court in *Artuz* also distinguished whether an application has been  
 13 "properly filed" from whether the claims contained in the application have merit and are  
 14 not procedurally barred. *Id.* at 9; see also *Pace*, 544 U.S. at 412-16.

15 Here, McKnight timely filed his first state petition in September 2016. (ECF No. 57-  
 16 2 (Exh. 102).) He filed the petition *pro se*, on the court's form. McKnight has now filed a  
 17 declaration with this Court stating that he called his appellate counsel after his convictions  
 18 were affirmed and asked what he could do next. (ECF No. 76-1 (Pet. Exh. 204).) Appellate  
 19 counsel sent him the form state habeas petition; counsel had typed in several sections  
 20 and had placed pink tabs where McKnight was supposed to fill information in and sign.  
 21 (See ECF No. 57-2 (Exh. 102).) Under paragraph 23, where it directs petitioner to state  
 22 concisely every ground and briefly summarize supporting facts, counsel had typed: "I AM  
 23 INDIGENT AND DO NOT UNDERSTAND THE LAW AND NEED COUNSEL  
 24 APPOINTED TO HELP ME COMPLETE THIS PETITION AND TO FILE A

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 26 <sup>3</sup>For example, when a postconviction petition is untimely under state law, "that [is]  
 27 the end of the matter' for the purposes of § 2244(d)(2)." *Pace v. DiGuglielmo*, 544 U.S.  
 28 408, 414 (2005). Under Nevada state law, a habeas petition must be filed within one year  
 after entry of the judgment of conviction if no appeal is taken, or, if an appeal is taken,  
 within one year after appellate court issues remittitur. See NRS § 34.726(1).

1 SUPPLEMENTAL PETITION.” *Id.* at 6. The Clerk of Court accepted the petition and filed  
2 it on September 2, 2016. *See id.*

3 Respondents briefly argue that because McKnight’s petition did not present any  
4 habeas claims it is not “properly filed” for the purposes of tolling the AEDPA limitations  
5 period. (ECF No. 74 at 8.) But they only cite *Pace*, which held that a petition that was  
6 untimely under state law was not “properly filed” and did not toll the federal statute of  
7 limitations. *Artuz*, however, described “properly filed” as whether the petition was  
8 delivered and accepted in compliance with applicable state laws and rules governing  
9 filing. 531 U.S. at 8-9. *Artuz* also differentiated between what might be viewed as the more  
10 clerical requirements—a document on the proper form, timely filed in the correct court,  
11 with the correct filing fee—from whether the document set forth meritorious claims that  
12 weren’t procedurally defaulted. It appears that “properly filed” under § 2244(d)(2) turns on  
13 complying with these more technical filing requirements, rather than an examination of  
14 the claims themselves. This Court finds that McKnight’s first state petition was “properly  
15 filed,” and therefore, the one-year federal statute of limitations was tolled while that  
16 petition was pending. The parties do not dispute that if McKnight’s first state petition was  
17 timely, his federal habeas action was timely commenced.

### 18 **B. Relation Back**

19 Next, Respondents argue that several claims in McKnight’s amended petition do  
20 not relate back to a timely-filed petition. (ECF No. 74 at 9-14.)<sup>4</sup> A new claim in an amended  
21 petition that is filed after the expiration of the AEDPA one-year limitation period will be  
22 timely only if the new claim relates back to a claim in a timely-filed pleading under Rule  
23 15(c) of the Federal Rules of Civil Procedure, on the basis that the claim arises out of “the

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26 <sup>4</sup>The Court rejects Respondents’ disingenuous argument that McKnight failed to  
27 properly incorporate the claims from his direct appeal in his original petition. McKnight  
28 explicitly incorporated the claims in the direct appeal, which he included with his petition.  
(*See* ECF No. 6.) He clearly stated, for example, “see attached ground one,” for each  
claim that was fully set forth in his attached appellate brief. (*See, e.g., id.* at 3, 32-35.)

1 same conduct, transaction or occurrence” as a claim in the timely pleading.<sup>5</sup> *Mayle v.*  
 2 *Felix*, 545 U.S. 644 (2005). In *Mayle*, the United States Supreme Court held that habeas  
 3 claims in an amended petition do not arise out of “the same conduct, transaction or  
 4 occurrence” as claims in the original petition merely because the claims all challenge the  
 5 same trial, conviction or sentence. 545 U.S. at 655-64. Rather, under the construction of  
 6 the rule approved in *Mayle*, Rule 15(c) permits relation back of habeas claims asserted  
 7 in an amended petition “only when the claims added by amendment arise from the same  
 8 core facts as the timely filed claims, and not when the new claims depend upon events  
 9 separate in ‘both time and type’ from the originally raised episodes.” 545 U.S. at 657. In  
 10 this regard, the reviewing court looks to “the existence of a common ‘core of operative  
 11 facts’ uniting the original and newly asserted claims.” A claim that merely adds “a new  
 12 legal theory tied to the same operative facts as those initially alleged” will relate back and  
 13 be timely. 545 U.S. at 659, 659 n.5; *see also Ha Van Nguyen v. Curry*, 736 F.3d 1287,  
 14 1297 (9th Cir. 2013).

15 **a. Grounds 1(a), 1(i), 1(j), 2, 8 and 9 relate back**

16 McKnight contends in ground 1(a) that trial counsel failed to identify the  
 17 constitutional basis for his motion to suppress the improper and suggestive eyewitness  
 18 identification by Syncerrity Ray. (ECF No. 48 at 4-5.) In ground 2 McKnight argues that  
 19 appellate counsel failed to identify the constitutional basis for the trial court’s error in  
 20 denying the motion to suppress the eyewitness identification by Ray. (*Id.* at 7.)

21 In his original petition, McKnight argued that the trial court erred when it denied the  
 22 motion to suppress the improper and suggestive eyewitness identification. (ECF No. 6 at  
 23 32-35.) The two claims in the amended petition turn on the legal theory of ineffective  
 24 assistance of counsel, but the Court concludes that the claims arise from the same core  
 25 facts, namely, the litigation and adjudication of the motion to suppress the witness  
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28 <sup>5</sup>The parties do not dispute that the claims in the amended petition must relate back to the original petition to be timely. (See ECF Nos. 74, 75.)

1 identification. See *Nguyen*, 736 F.3d at 1287.<sup>6</sup> Grounds 1(a) and 2 relate back and are  
2 therefore timely.

3 McKnight next contends in ground 1(i) that trial counsel failed to investigate and  
4 introduce mitigation evidence and move to counter or eliminate aggravating evidence  
5 such as the preliminary hearing transcripts from an unrelated murder case that was  
6 subsequently dismissed. (ECF No. 48 at 6.) In ground 8 McKnight contends that the State  
7 engaged in prosecutorial misconduct by using information from a pending and unrelated  
8 murder case as aggravating evidence during the penalty phase. The State later  
9 dismissed that case due to identification issues. (ECF No. 48 at 8.)

10 In McKnight's original petition, he claimed that the trial court improperly admitted  
11 at sentencing the preliminary hearing transcript related to a separate pending murder  
12 prosecution against him. Similar to the issue of the motion to suppress, here the Court  
13 concludes that, while the amended claims are for ineffective assistance of counsel and  
14 prosecutorial misconduct, the claims arise from the same core set of facts—the  
15 introduction of the hearing transcript at sentencing. The Court holds that grounds 1(i) and  
16 8 relate back and are timely.

17 In ground 1(j) McKnight asserts that trial counsel's cumulative violations render his  
18 convictions void and in ground 9 he argues that the cumulative and prejudicial errors of  
19 the state district court, trial and appellate counsel, and prosecutorial misconduct entitle  
20 him to habeas relief. (ECF No. 48 at 6, 8-9.) McKnight argued in his original petition that  
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22 <sup>6</sup>Respondents argue that *Nguyen* conflicts with the Ninth Circuit's earlier decision  
23 in *Schneider v. McDaniel*, 674 F.3d 1144 (9th Cir. 2012). In *Schneider*, the appeals court  
24 held that the relation back doctrine did not apply where the original theory was based on  
25 trial counsel's alleged failures and the amended theory was based on the trial court's  
26 alleged errors. See *id.* at 1151. Respondents contend that *Schneider* controls because  
27 when a subsequent three judge panel opinion conflicts with the opinion of an earlier three  
28 judge panel the earlier decision controls. (ECF No. 77 at 11 (citing *Avagyan v. Holder*,  
646 F.3d 672, 677 (9th Cir. 2011); *Antonio v. Ward's Cove Packing Company, Inc.*, 810  
F.2d 1477, 1478-79 (9th Cir. 1987)).) *Nguyen* makes no mention of the *Schneider*  
decision. The Court acknowledges this potential tension but remains persuaded that  
McKnight's claims of ineffective assistance of counsel in grounds 1(a) and 1(i) (discussed  
next) sufficiently relate back to the underlying substantive claims of trial court error.

1 the cumulative effect of errors during trial severely prejudiced him. (ECF No. 6 at 63.)  
 2 Grounds 1(j) and 9 also relate back and are therefore timely.

3 **b. Ground 3 relates back in part**

4 McKnight claims that the trial court violated his equal protection rights by allowing  
 5 the prosecution to discriminate against three jurors of color. (ECF No. 48 at 7.) He further  
 6 argues that the court improperly curtailed the defense from inquiring into a juror's racial  
 7 bias. The court also disagreed with the defense that the juror, who stated that he was part  
 8 of a group that may be viewed as racist, was biased. In his original petition, McKnight  
 9 argued that the trial court violated his Fifth and Fourteenth Amendment rights when it  
 10 denied the defense's *Batson*<sup>7</sup> challenge as to those three jurors of color. (ECF No. 6 at  
 11 35-39.) This part of ground 3 in the amended petition clearly relates back. However, the  
 12 claim that the trial court did not permit the defense to further inquire into a fourth juror's  
 13 potential racial bias involves separate facts and differs in time and type from the *Batson*  
 14 challenges raised in both the original and amended petition. The *Batson* challenge part  
 15 of ground 3 relates back and is timely. The claim about another juror's potential racial  
 16 bias does not relate back; the Court dismisses that portion of ground 3 as untimely.

17 **c. Grounds 5 and 10 are dismissed as untimely**

18 McKnight argues in ground 5 that the trial court violated his Sixth Amendment right  
 19 to an impartial jury by failing to sever his trial from Burnside's death penalty trial because  
 20 "Burnside's trial attorney introduce[d] harmful prejudicial evidence against [McKnight]." (ECF No. 48 at 8.) In his original petition, McKnight claimed that the trial court violated his  
 21 Sixth and Fourteenth Amendment rights to a fair and impartial jury because he had a  
 22 death-qualified jury when he should have been able to impanel a separate, non-death  
 23 qualified jury.<sup>8</sup> (ECF No. 6 at 40-42.) These claims do not share a common core of  
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25 <sup>7</sup>*Batson v. Kentucky*, 476 U.S. 79 (1986).  
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27 <sup>8</sup>McKnight cites to the dissent in *Buchanan v. Kentucky*, which stated that "the  
 28 evidence is overwhelming that death qualified juries are substantially more likely to  
 convict on more serious charges than juries on which unaltered opponents on capital  
 punishment are permitted to serve." 483 U.S. 402, 407 (1987).

operative facts. McKnight originally alleged that he was denied an impartial jury because he was not allowed to empanel a non-death qualified jury. But in the amended petition he argues he was denied an impartial jury because of the harmful and prejudicial evidence that his co-defendant's counsel introduced against him. The Court concludes that ground 5 does not relate back to a timely-filed claim, and therefore, it is dismissed as untimely.

Finally, in ground 10 McKnight claims he is actually innocent. (ECF No. 48 at 9.) He did not present this claim in his original petition.<sup>9</sup> Ground 10 does not relate back to a timely claim; the Court dismisses ground 10 as untimely.

**d. Petitioner withdraws grounds 1(b), (c), (d), (e), (f), (g) (h)**

Next, McKnight acknowledges that these seven subparts of ground 1 do not relate to any timely-filed claims. (See ECF Nos. 6, 48, 75.) But he argues that he is entitled to equitable tolling of these claims due to the COVID-19 pandemic, beginning late December 2019. (ECF No. 75 at 20-21.) The Court need not delve into a discussion of equitable tolling, however, because McKnight's AEDPA limitations period expired well before December 2019. After his convictions were affirmed, 168 days elapsed before McKnight filed his first state postconviction petition. (See ECF No. 56-48 (Exh. 98); ECF No. 57-2 (Exh. 102).) Because the Court deems that petition timely, the AEDPA clock re-started the day after remittitur issued on October 25, 2017. (See ECF No. 57-20 (Exh. 120).) The AEDPA limitations period expired on May 10, 2018, more than a year and a half before the COVID pandemic began in about December 2019. Thus, McKnight's argument that he is entitled to equitable tolling due to the pandemic is unavailing. He alternatively states that he wishes to withdraw these claims. Accordingly, grounds 1(b), 1(c), 1(d), 1(e), 1(f), 1(g), and 1(h) are withdrawn.

**C. Exhaustion**

Respondents next argue that the grounds that this Court has held relate back are unexhausted. (ECF No. 74 at 15-18.) A federal court will not grant a state prisoner's

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<sup>9</sup>The Court further notes that McKnight did not argue on direct appeal that he was actually innocent. (ECF No. 56-35 (Exh. 85).)

petition for habeas relief until the prisoner has exhausted his available state remedies for all claims raised. See *Rose v. Lundy*, 455 U.S. 509 (1982); 28 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims before he presents those claims in a federal habeas petition. See *O’Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999); see also *Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the petitioner has given the highest available state court the opportunity to consider the claim through direct appeal or state collateral review proceedings. See *Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004); *Garrison v. McCarthey*, 653 F.2d 374, 376 (9th Cir. 1981).

**a. Grounds 8 and 9 are exhausted**

McKnight presented federal ground 8—the claim that the State engaged in prosecutorial misconduct by using information from a pending and unrelated murder as aggravating evidence during the penalty phase—on direct appeal. (See ECF No. 56-35 at 42-45 (Exh. 85); ECF No. 56-48 at 14-15 (Exh. 98).) This claim is exhausted. Ground 9 asserts cumulative error. (ECF No. 48 at 6, 8-9.) Ground 9 is exhausted as to any exhausted claims that remain before the Court.

**b. Grounds 1(a), 1(i), 1(j), and 2 are unexhausted**

These four grounds all assert ineffective assistance of trial or appellate counsel. McKnight did not present these claims to the state courts. (See ECF No. 56-35 (Exh. 85); ECF No. 56-48 (Exh. 98); ECF No. 57-2 (Exh. 102); ECF No. 57-10 (Exh. 110); ECF No. 57-17 (Exh. 117); ECF No. 57-22 (Exh. 122); ECF No. 57-30 (Exh. 130); ECF No. 57-32 (Exh. 132).) These grounds are all unexhausted.

**D. McKnight Seeks a Stay**

Next, McKnight asks the Court to stay this case so that he may return to state court with his unexhausted claims. (ECF No. 75 at 34-36.) In *Rhines v. Weber*, 544 U.S. 269 (2005), the Supreme Court placed limitations upon the discretion of the court to facilitate habeas petitioners’ return to state court to exhaust claims. First, “stay and abeyance should be available only in limited circumstances.” *Rhines*, 544 U.S. at 277. And the relief

1 is “is only appropriate when the district court determines there was good cause for the  
 2 petitioner’s failure to exhaust his claims first in state court.” *Id.* Moreover, “it likely would  
 3 be an abuse of discretion for a district court to deny a stay and to dismiss a mixed petition  
 4 if the petitioner had good cause for his failure to exhaust, his unexhausted claims are  
 5 potentially meritorious, and there is no indication that the petitioner engaged in  
 6 intentionally dilatory litigation tactics.” *Id.* at 278. The Ninth Circuit has held that the  
 7 application of an “extraordinary circumstances” standard does not comport with the “good  
 8 cause” standard prescribed by *Rhines*. See *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th  
 9 Cir. 2005). The court may stay a petition containing both exhausted and unexhausted  
 10 claims if: (1) the habeas petitioner has good cause; (2) the unexhausted claims are  
 11 potentially meritorious; and (3) petitioner has not engaged in dilatory litigation tactics. See  
 12 *Rhines*, 544 U.S. at 278; see also *Wooten v. Kirkland*, 540 F.3d 1019, 1023-24 (9th Cir.  
 13 2008).

14 Here, McKnight asks the Court to stay this action while he litigates a counseled  
 15 state postconviction petition. (ECF No. 75 at 34-36.) He argues that he has good cause  
 16 because he previously was without counsel in his state postconviction proceedings. See  
 17 *Dixon v. Baker*, 847 F.3d 714, 721 (9th Cir. 2017). He contends that his claims alleging  
 18 ineffective assistance of trial and appellate counsel related to his motion to suppress the  
 19 eyewitness identification (grounds 1(a), 2), his claim that trial counsel failed to challenge  
 20 aggravating evidence including the preliminary hearing transcripts from an unrelated  
 21 murder case which was subsequently dismissed (ground 1(i)), and trial counsel’s  
 22 cumulative error (ground 1(j)) entitle him to habeas relief. He also insists that he is not  
 23 engaging in dilatory tactics but seeks a stay in order to advance postconviction litigation.

24 Respondents oppose, arguing that granting a stay here contravenes AEDPA’s  
 25 goals of reducing delay and encouraging petitioners to follow state procedural rules. (ECF  
 26 No. 77 at 21-23.) They also urge that granting a stay would incentivize petitioners to  
 27 purposefully neglect to raise and/or develop the factual basis of their claims in accordance  
 28 with state law, then return to state court when their claims are barred, and then improperly

1 benefit from de novo review in federal court. They argue that lack of counsel alone does  
2 not establish good cause and that McKnight fails to demonstrate his claims are not plainly  
3 meritless.

4 The Court concludes that a stay is warranted under these circumstances. The  
5 Ninth Circuit Court of Appeals has held that a petitioner can show good cause for a stay  
6 if he was without counsel in his state postconviction proceedings. See *Dixon*, 847 F.3d at  
7 721. As a general matter, the Court is sympathetic to arguments that petitioners should  
8 not be incentivized to fail to raise and develop the factual basis of their claims in  
9 accordance with state law. But here McKnight clearly attempted to follow state procedural  
10 rules and sought counsel to help him file a state petition. He followed the explicit direction  
11 of his appellate counsel in attempting to file his first state postconviction petition. He  
12 appealed the denial of that petition, and filed a petition for rehearing, repeatedly pointing  
13 out that he had asked for counsel. The record simply does not suggest that McKnight  
14 intentionally failed to raise and develop the factual basis of his claims in state court. His  
15 claims are not plainly meritless. To be sure, McKnight faces an uphill battle in state court.  
16 But he is serving a sentence of life without parole, and he has never had an opportunity  
17 to pursue counseled state postconviction litigation. And of course, if McKnight obtains  
18 relief in state court his petition here would be rendered moot. Accordingly, the Court  
19 grants the motion for a stay and abeyance.

#### 20 **IV. CONCLUSION**

21 It is therefore ordered that Respondents' Motion to Dismiss (ECF No. 74) is  
22 granted in part and denied in part as follows:

23 grounds 5 and 10 are dismissed;

24 ground 3 is dismissed in part—the claim that the court did not permit defense  
25 counsel to further inquire into a prospective juror's potential racial bias is dismissed;

26 grounds 1(b), 1(c), 1(d), 1(e), 1(f), 1(g) and 1(h) are withdrawn;

27 grounds 8 and 9 are exhausted; and

28 grounds 1(a), 1(i), 1(j), and 2 are unexhausted.

1 It is further ordered that Petitioner is granted a stay and abeyance. This action is  
2 stayed pending final resolution of Petitioner's state postconviction proceedings.

3 It is further ordered that the grant of a stay is conditioned upon Petitioner returning  
4 to federal court with a motion to reopen the case within 45 days of the issuance of the  
5 remittitur by the state appellate court at the conclusion of the state-court proceedings.

6 It is further ordered that the Clerk of Court administratively close this action, until  
7 such time as the Court grants a motion to reopen the matter.

8 DATED THIS 6<sup>th</sup> Day of June 2024.

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MIRANDA M. DU  
12 CHIEF UNITED STATES DISTRICT JUDGE  
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